

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 3 – UNIT 2 - CONTRACT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Citation of case law or statutory authority: many questions credit marks for appropriate citation, and in some questions, it is not possible to get full marks without it. Candidates should be encouraged to cite case law or statute appropriately, in both Scenario A and B questions. Candidates may find the Unit Specification helpful in this regard.

Being conversant with the Unit Specification may also be helpful for candidates as a means of familiarising themselves with the terminology of the subject. For example, candidates would be less likely to confuse the incorporation of terms with the implication of terms; or to confuse termination for breach with rescission for misrepresentation; both of which were common errors.

In many cases in Scenario B questions, candidates did not apply the law they had just been invited to state. Whilst not a universal rule, it is generally the case that where questions in Section B initially require the statement or explanation of legal principles, the next sub-question is likely to involve their application.

This was the first exam in which there was a significant part of a Scenario B question given over to the Consumer Rights Act 2015. Given the length of time it has been in force, it should now be a familiar feature of the landscape of the module, though the questions on it were not generally well answered.

Other areas of the paper where candidates struggled were:

- the remedies available where performance had been prevented (damages or payment for work done (quantum meruit) but not payment of the price itself);
- the detailed law and application relating to incorporation of terms by notice;
- the application of the law relating to damages under s.2(1) of the Misrepresentation Act 1967 and to rescission for misrepresentation and the bars to rescission;
- the application of the Hong Kong Fir test relating to innominate terms.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1 Generally answered very well.

Question 2

Quite a few candidates could not name the statute at all, or sufficiently accurately (perfect answers were not required for the mark).

Question 3 Generally answered well.

Question 4 Generally answered well.

Question 5

Generally answered fairly well. One or other "full" definition or supporting authority was required for both marks.

Question 6 Generally answered very well.

Question 7

Very mixed. Quite a lot of candidates (nearly half) appeared not to be familiar with the terminology of "implied by the courts", so missed the point of the question; despite the fact that this terminology is referred to in the Unit Specification.

Question 8 Generally answered very well.

Question 9

Many candidates confused half-truths with the principle from With v O'Flanagan relating to correcting a statement which had become untrue.

Question 10 Generally well answered.

Question 11

Many candidates were not able to clearly articulate the forward looking purpose of damages in contract, whether articulated as loss of bargain / to put in the position as if the contract had been performed.

Section B

Scenario 1

Overall, candidates performed quite well on this Scenario, which was chosen by over half of the candidates.

Question 1

Candidates did well on both parts (a) and (b) relating to conditions and remedies for breach of condition.

Question 2

Candidates did well on parts (a) and (b) on the complete performance rule. They did poorly on part (c); most candidates focused only on the second part of the question ("or has any other remedy") and did not address the first part relating to whether the right to payment for the second part of the contract had arisen.

Question 3

Candidates did reasonably in stating and applying the rules relating to past consideration in parts (a) and (b).

Question 4

Candidates did reasonably in stating and applying the rules relating to Pinnel's Case; though many candidates miss the final mark of part (a) by stating that part payment is not good consideration, without saying what it is not good consideration *for*. Quite a few candidates came at part (c) of this question from an "offer and acceptance" angle and so dropped marks for not relating the question to the consideration issues.

Scenario 2

Overall, candidates did not perform well on this Scenario, though it was only chosen by a small 6.5% proportion of candidates. As noted above, this is the first time in which there was a significant part of a Scenario B question given over to the Consumer Rights Act 2015.

Question 1

Candidates were not generally familiar with the legal definitions required for part (a) and many put forward lay descriptions of the terms instead.

Many candidates were not able to state and apply the requirements relating to the payment of a reasonable price in the absence of an agreed price in part (b).

Question 2

Candidates did satisfactorily on part (a), but performance was quite weak in the other three parts. In part (b), not many candidates picked up that the breach of contract related to the service, not goods, element of the facts. In part (c), the explanations of the remedies were generally quite weak (or too few remedies identified accurately). Few candidates picked up on the mitigation point in part (d), though the fact pattern contained what was thought to be enough of a signpost.

Question 3

Candidates generally did well in stating the law in part (a). The application in parts (b) and (c) was only fair – good candidates drew on the fact pattern and the term of the contract provided in applying the legal principles.

Question 4

Candidates performed surprisingly poorly on this question. This may be because the question was not divided up into “law” and “application” elements, or because it did not come straight after other questions concerning the incorporation of terms. Certainly, similar questions in previous exams have elicited significantly better responses.

Scenario 3

Candidate performance on this question was a little disappointing, largely on account of somewhat weak application of the law in questions 2(b), 3(b) and 4(b) (see below).

Question 1

Candidates did reasonably in stating and applying the rules relating to terms and representations in parts (a) and (b).

Question 2

Candidates easily identified the different types of misrepresentation in part (a). In part (b) quite a few candidates were able to identify or explain why fraudulent misrepresentation could be ruled out. However, the detailed application of the law in section 2(1) of the Misrepresentation Act 1967 (to distinguish between “innocent” and “negligent” misrepresentation was beyond most candidates.

Question 3

Candidates identified the remedies by name well in part (a). However, the application in part (b) was generally quite weak. Few candidates got to grips

with the tortious nature of the remedy in damages; and few candidates considered the issue of whether rescission was barred.

Question 4

Candidates' answers were generally weak on both stating the law (part (a)) and applying it (part (b)). It is suspected this question was answered less well than equivalent questions have been in the past, on account of it being at the tail end of a terms, representation and misrepresentation question.

**SUGGESTED POINTS FOR RESPONSES
LEVEL 3 – UNIT 2 – CONTRACT LAW**

The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

SECTION A

Question Number	Suggested points for responses	Max marks
Q1	<ul style="list-style-type: none"> • Offer and acceptance (both required) / agreement • Intention to create legal relations • Consideration 	3
Q2	<ul style="list-style-type: none"> • Contracts (Rights of Third Parties) Act 1999 	1
Q3	<ul style="list-style-type: none"> • Offer shows willingness to be bound • Gives rise to a contract if accepted • e.g. <u>Carlill v Carbolic Smoke Ball Co</u> (1893) • Invitation to treat is merely an invitation for offers or to open negotiations • e.g. <u>Gibson v Manchester City Council</u> (1979) • cannot be accepted to give rise to a contract 	4
Q4	<ul style="list-style-type: none"> • Request for information is an enquiry about terms of offer, not proposal in its own right • Offer remains open • <u>Stevenson, Jacques & Co v McLean</u> (1880) • Counter-offer constitutes a proposal in its own right • Impliedly rejects the offer • <u>Hyde v Wrench</u> (1840) 	4
Q5	<ul style="list-style-type: none"> • Benefit to the promisee or a detriment to the promisor • <u>Currie v Misa</u> (1875) <p>or</p> <ul style="list-style-type: none"> • 'The price for which the promise of the other party is bought' • <u>Dunlop v Selfridge</u> (1915) 	2
Q6	<ul style="list-style-type: none"> • Presumption that there is no intention to create legal relations in social agreements • This may be rebutted by evidence to the contrary • Example: e.g. practical benefit /separation /party at disadvantage • Relevant case, e.g. <u>Jones v Padavatton</u> (1969) 	3
Q7	<ul style="list-style-type: none"> • Implied on the particular facts • By the business efficacy test 	4

	<ul style="list-style-type: none"> • <u>The Moorcock (1889)</u> - or explanation • By the officious bystander test • <u>Shirlaw v Southern Foundries (1926) Ltd (1939)</u> - or explanation • As a matter of policy / where the nature of the contract implicitly requires it • <u>Liverpool City Council v Irwin (1976)</u> 	
Q8	Warranty	1
Q9	<ul style="list-style-type: none"> • Literally true • But misleading / partial account • e.g. <u>Nottingham Patent Brick & Tile Co v Butler (1866)</u> 	2
Q10	<ul style="list-style-type: none"> • Destruction of subject-matter • Illness/death of a party • Supervening illegality • Government intervention • Event, the sole reason for the contract, does not take place 	3
Q11	<ul style="list-style-type: none"> • Compensatory / not punitive • Monetary / financial form (needs to relate to compensation, not the loss for which given) • Position as if contract performed • <u>Robinson v Harman (1848)</u> 	3
Total		30 marks

SECTION B		
Scenario 1		
Question Number	Suggested points for responses	Max marks
Q1(a)	<ul style="list-style-type: none"> • Damages for any loss • Termination / repudiation of contract (not rescission) • Irrespective of seriousness of breach • <u>Poussard v Spiers & Pond</u> (1876) 	3
Q1(b)	<ul style="list-style-type: none"> • Completion by end of February a condition of contract • As the work was not completed by then, condition breached. • Dina entitled to terminate contract with Sparkies 	3
Q2(a)	<p>Complete performance rule</p> <ul style="list-style-type: none"> • Performance must be complete and exact (emphasis req'd) • Before can demand performance from the other party • Rule in <u>Cutter v Powell</u> / <u>Cutter v Powell</u> (1795) <p>Exceptions</p> <ul style="list-style-type: none"> • Divisible / separate obligations • Substantial performance • Acceptance of partial performance • Prevention of performance • Tender of performance 	4
Q2(b)	<ul style="list-style-type: none"> • Contract is divisible into separate obligations • Wallfit have fully performed first part of contract • Entitled to payment of £15,000 for this part 	3
Q2(c)	<ul style="list-style-type: none"> • Not completely performed the second part • Not substantially performed • As only half of tiling done • <u>Bolton v Mahadeva</u> (1972) • Prevented from performing by Dina • May seek payment for value of work done to date / quantum meruit • May sue for damages for loss suffered • These are alternative remedies • <u>Planche v Colburn</u> (1831) 	7
Q3(a)	<ul style="list-style-type: none"> • General rule is that past consideration not good consideration • e.g. <u>Re McArdle</u> (1951). <p>Exception where:</p> <ul style="list-style-type: none"> • act or promise is done or given at request of promisor; • understood by parties that payment to be made / implied promise / assumpsit • payment would have been legally recoverable if promised in advance; • e.g. <u>Lampleigh v Brathwaite</u> (1615) or <u>Re Casey's Patents</u> (1892) 	5
Q3(b)	<ul style="list-style-type: none"> • Dina's promise to pay comes after "consideration" (fixing plugs) • So prima facie fixing plugs is past consideration. 	6

	<ul style="list-style-type: none"> • However, fixing of the plugs was carried out at Dina’s request • Payment would have been legally recoverable if promised in advance • Parties are in a commercial relationship • Work is of the same nature as that which is to be paid for • So likely to be understood that it was to be paid for • Voltamp can therefore sue for the additional £500 	
Q4(a)	<ul style="list-style-type: none"> • Part payment of a debt • not good consideration • for a promise by creditor to release debtor from balance 	3
Q4(b)	<ul style="list-style-type: none"> • Payment at the creditor’s request before the due date • Payment with non-money consideration (such as a chattel) • Settlement of a disputed claim • Composition agreements with creditors • Payment is made by a third party 	2
Q4(c)	<ul style="list-style-type: none"> • Can recover full amount unless exception to Rule in Pinnel’s Case applies • Accepting free breakfasts in exchange falls within chattel (“horse, hawk or robe”) exception • Good consideration for release • As a result, he can only recover the £4,000 	4
Total:		40 marks

Scenario 2

Question Number	Suggested points for responses	Max Marks
Q1(a)	<ul style="list-style-type: none"> • Section 2 of Consumer Rights Act 2015 • trader is a person acting for purposes relating to trade, business, craft or profession • a consumer is an individual • acting for purposes wholly or mainly outside their trade, business, craft or profession 	2
Q1(b)	<p>Parties are trader and consumer</p> <ul style="list-style-type: none"> • As no price agreed between Marvin and Zelda • Zelda must pay a reasonable price for the service • section 51 of the Consumer Rights Act 2015 • Facts indicate that £175 is perhaps a reasonable price • Zelda does not have to pay the £2,000 for which she has been invoiced 	4
Q2(a)	<ul style="list-style-type: none"> • Satisfactory quality (no synonyms acceptable for satisfactory) • Reasonably fit for purpose (no need to say “reasonably”) • Match (accept correspond with) their description 	3
Q2(b)	<ul style="list-style-type: none"> • Term to perform the service with reasonable care and skill • implied by section 49 of the Consumer Rights Act (CRA) 2015 • Failed to comply by not tightening washers enough 	3

Q2(c)	<ul style="list-style-type: none"> • Right to require repeat performance • section 55 CRA 2015 • to perform service again to extent necessary to complete in conformity with contract • Right to a price reduction • section 56 of Consumer Rights Act 2015 • to require price reduction by approp. amount where repeat performance not provided • Damages for loss suffered as a result of breach of contract • loss must be caused by the breach • not be too remote a consequence of the breach • Treat contract as at an end / termination (not rescission) • Depending upon the seriousness of the breach 	6
Q2(d)	<ul style="list-style-type: none"> • Required to act reasonably • to mitigate the losses • <u>British Westinghouse v Underground Electric Railway (1912)</u> • Quentin has not taken reasonable steps to reduce losses he has suffered • Will not be able to recover compensation for damage to flooring 	3
Q3(a)	<ul style="list-style-type: none"> • Presumption is that they are normally intended to give rise to legal relations • e.g. <u>Edmonds v Lawson (2000)</u> • But presumption is rebuttable by evidence to the contrary 	2
Q3(b)(i)	<ul style="list-style-type: none"> • Arrangement is a commercial one • Presumption that intended to give rise to legal relations applies • Terms indicate HH liable to pay for call-outs placed (credit reference to contract) • Not rebutted by honour clause • Marvin should therefore be able to claim for the two call-outs he has responded to • <u>Rose & Frank v Crompton (1925)</u> 	4
Q3(b)(ii)	<ul style="list-style-type: none"> • Commercial presumption may be rebutted by evidence • For the future, arrangement 'shall be binding in honour only' • Shows intention that not intended to give rise to ongoing legal relationship / rebutted • Harris Hotels are not legally obliged to place further call-outs with Marvin • Marvin cannot recover damages for their failure to do so 	4
Q4	<ul style="list-style-type: none"> • It is in terms intended to bind the parties / contractual in nature • <u>Chapelton v Barry UDC (1940)</u> 	9

	<ul style="list-style-type: none"> • The leaflet is not signed by customers • So not incorporated by signature • Terms may nevertheless be incorporated by reasonable notice • e.g. <u>Parker v South Eastern Railway</u> (1877) • Being in red writing and large font, likely to satisfy the test of sufficiency of notice • e.g. <u>Thornton v Shoe Lane Parking</u> (1971) • clause deals merely with an admin. matter – not onerous term • Cf. <u>Interfoto Picture Library v Stiletto Visual Programmes</u> (1988) • Leaflet terms sent before the contract is formed • So notice of its terms is given before the formation of the contract • e.g. <u>Olley v Marlborough Court</u> (1949) • Reasonable conclusion / likely to be incorporated 	
Total:		40 marks
Scenario 3		
Question Number	Suggested points for responses	Max Marks
Q1(a)	<ul style="list-style-type: none"> • Statement made outside the contract • May induce a party to enter a contract • Not, per se, a term 	2
Q1(b)(i)	<ul style="list-style-type: none"> • Importance of capacity of the Satay Supreme was emphasised by Seanut • <u>Bannerman v White</u> (1861) • Matter is something likely to be within Ravi's special knowledge – suggests term • <u>Oscar Chess v Williams</u> (1957) • As contract was oral, absence of writing does not suggest that less likely to be term • Even though significant amount of time passed • <u>Routledge v Mackay</u> (1954) • Conclusion e.g. statement is likely to be a term of contract 	5
Q1(b)(ii)	<ul style="list-style-type: none"> • Only true to best of his knowledge, so is not intending to give an assurance about it • Invited Seanut to check it – suggests not intended to be term. • Significant period of time between the statement and the contract – suggests not term • No importance is attached to the statement by Seanut – suggests not term 	5

	<ul style="list-style-type: none"> • Not in writing • Statement is unlikely to form part of the contract between Ravi and Seanut 	
Q2(a)	<ul style="list-style-type: none"> • Fraudulent • Negligent / i.e. within s2(1) of the Misrepresentation Act 1967 • Innocent 	3
Q2(b)	<ul style="list-style-type: none"> • R. believed his statement to be true • So not a fraudulent misrepresentation • Misrep. is innocent where falls outside of s.2(1) MA 1967 • Burden of proof is on Ravi, the misrepresenter, to show • reasonable ground to believe that facts represented were true • and actual belief • up to the time the contract was made • Checking logbook would have shown its true tonnage • Did not have an objectively reasonable ground for the belief • As relied on recollection • <u>Howard Marine v Ogden (1978)</u> • Conclusion: 'negligent' misrepresentation, i.e. falling within s.2(1) of MA67 	7
Q3(a)	<ul style="list-style-type: none"> • Damages • Rescission 	2
Q3(b)	<ul style="list-style-type: none"> • May claim damages under s.2(1) of MA67 (refer to Act for mark) • for loss directly caused by the misrepresentation • calculated basis as in tort of deceit • <u>Royscot Trust v Rogerson (1991)</u> • If the true position had been represented, would have entered contract with lower charge • On this basis, it would claim damages for additional hire it has paid • Contract now been fully performed • Not possible to restore the parties to their pre-contractual position. • They will not be able to rescind the contract 	7
Q4(a)	<ul style="list-style-type: none"> • Term which cannot be classified at time of formation / wait and see • Innocent party may terminate contract for breach • only if the breach is sufficiently serious • <u>The Hongkong Fir (1962)</u> • Damages may be claimed for any breach 	4
Q4(b)	<ul style="list-style-type: none"> • Unlikely to be intention that innocent party should have right to terminate on any breach • so not likely to be a condition 	5

	<ul style="list-style-type: none">• Likely to be intention that contract can be terminated on serious breach• Likely therefore to be classified as innominate• As only two out crew have been unable to work and only for a short period• Breach is not a serious breach• Oceanlime will not have the right to terminate the charter.	
Total:		40 marks